from principle to principle, citing but one good authority for each and not breaking the flow of thought by padding with a mass of citations. The modern practice of cutting it up into numberless paragraphs, prefaced by headings of small capitals and loaded down with cases and quotations in bold-faced type, destroys all closeness of reasoning. It is not the judicial eye but the judicial mind which we want to impress. If our ideas do not impress the latter, our type will vainly appeal to the former. A return to briefs which are arguments and not digests will exert a powerful influence in the production of model opinions.

In what we have said we do not wish to be understood as having our own official reports solely in mind. So far as the work of the reporter is concerned, we belive it above the average and that it has shown a constant improvement. We have referred to certain special instances in no fault-finding spirit, but solely by way of illustration, and we hope in conclusion that our remarks may cause those most interested to give the subject earnest thought and result in an endeavor on the part of all to restore our reports to the eminence which they enjoyed in the days of Roane and Tucker.

Respectfully submitted.

AN APPEAL TO THE AREOPAGUS.

There is a question of State Rights, lying deeply buried in the voluminous Virginia *Habeas Corpus* cases—*in re Ayres, in re Scott, in re McCabe* (123 United States Reports, page 443)—to which it is desired, in this place, to invite attention, and to suggest a solution of it different from the one which, so peremptorily, it has received from the Supreme Federal Court. In this country of independent thought and free discussion, there is reserved for an oppressed, or misunderstood, truth an appeal to the forum of opinion which is supplied with a more potential executive force than the utterance even of an ultimate Federal Court.

In that jurisdiction a light is permitted to penetrate through any cleft or fissure, although to shine with a feeble and struggling ray. Within those precincts is a Hill of Mars, on which an Areopagus holds midnight sessions, administering a blindfold justice, open to every suitor. To this court, thus high-throned, this appeal now is carried.

In a government, as this republic of combined sovereign States,

poised and balanced between extremes, it is the duty of every court, whenever summoned so to arbitrate, scrupulously to uphold the rights of the States, counteracting and binding, by this policy, the deep, the impetuous, revolutionizing current steadily running towards an antagonistic power, in proximity to the States and connected with them by innumerable ties. To constitute such a bulwark to the rights of the States, without doubt, was the highest function expected of Federal Courts, as planned and framed by the architects of the Constitution.

Upon the loyal performance of the brave duty, amid all oscillations and derangements, produced by accident or the times, depended the retention of the system's federative character, as a substantiality, at least as something more than the empty shell which it is the inclination of the Supreme Court to make it. It is doubtless more agreeable, perhaps safer and more profitable, too, to pay court to the great king, throned at the center, rather than to the States, whose jurisdiction has been absorbed, and whose revenues have been sequestrated and dispensed by a profuse imperial hand. To a system, thus nicely arranged, concentration is as destructive as secession. Perhaps it is more so, since consolidation devours the material out of which the Federal conglomerate was composed, whereas secession, as it occurred with the first Federal experiment, may be followed by a reconstruction, with a revived spirit and improved forms. As the citizen beholds headlands crumble away, and familiar landmarks disappear, naturally he dreads the encroaching wave. Like Atlas, upholding the superincumbent weight, the States are stationary pillars, whilst the Central Organ, their creature, is imbued with an incessant and powerful activity, whose heart-beats throb through the system. Absorption now is the danger point. After discharging its wrathful vials, like an exhausted vaporous cloud, secession has drifted off. Perhaps no mistake in statesmanship is so great as that which allows terrible objects in the past to blind the statesman to present dangers. Oliver Cromwell, able as he was as General and statesman, with an historical English dread of Armadas, continued to be apprehensive of the power of Spain after that great body had been smitten with palsy, and did not see across a gulph of water, but twenty miles from Dover Cliffs, that a new power had risen to threaten the independence and endanger the peace of Europe. The warning, given to the adventurous mariner of antiquity, ought to be inscribed over the judgment seat of each United States Court—*in medio tutissimus ibis*—for, Scylla's barking waves are as terrible as Charybdis, and Charybdis as Scylla.

To carry into effect the reasonable expectation of the fathers of the new-modeled republic, each Federal judge ought to constitute himself a guardian *ad litem* to a State, whenever one of them is a party to a controversy before him, to vindicate its rights under the Constitution, not to seize the occasion to strip it still farther of sovereign attributes, to pluck other royal feathers from its crest.

The point proposed for examination will be extricated from the mass of facts with which it is connected and set distinctly before us. The validity of the statute of May 12, 1887, passed at an extra session of the Virginia Legislature, was questioned at the bar of the Supreme Court as authority for certain tax suits which had been instituted by the Attorney-General and the two Commonwealth's attorneys, his co-defendants in the court below and joint petitioners to the Supreme Court. After learned argument, the Supreme Court sustained the impeached statute as a legal basis for the suits which had been enjoined, and discharged the officers of the State of Virginia from the custody of the marshal, on the ground that the Circuit Court for the Eastern District of Virginia, in which the suits had been brought, was without jurisdiction, because of the exemption contained in the eleventh amendment of the Constitution of the United States, thus annulling and avoiding, from the beginning, the proceedings against the defendants. But one of the petitioners, the second named in the record, in his answer to the rule to show cause, had insisted very earnestly, as one of his grounds, that the constitutionality of the act of May 12th was not necessarily involved in the judicial inquiry—thus introducing into the controversy, with the creditors of the State of Virginia, a very important and, as it proved, a very litigated question of States' Rights—because, he insisted, by an understood principle of public law, applicable to this case, the act of May 12th, whether constitutional or not, was valid as an authority to protect the servants of Virginia, acting in obedience to her law, from all personal responsibility, although it might not be adjudged valid for other purposes.

The case of Alexander McLeod was relied upon to sustain that proposition of law. McLeod was a British subject, who had been indicted in one of the courts of the State of New York for an alleged murder. The British Government avowed its responsibility for McLeod's act and demanded his release from imprisonment and accusation. The homicide had occurred during the administration of President Tyler, and Mr. Webster, in a position appropriate to his great talents, was the Secretary of State. With a noble candor, which distinguished

his diplomatic career, extending through two Presidential terms, and which imparted dignity to his office and lustre to his character, the Secretary acceded to the British demands, saying: "In the opinion of the United States, the avowal on the part of his government protected McLeod from personal responsibility." (The case of the Caroline, Life of Daniel Webster, by George Ticknor Curtis, Vol. II. p. 68.) This recognition of the public law by the United States makes McLeod's case a precedent of the highest authority in the jurisprudence of nations, where it stands as a fixed rock. But is it to govern in cases like that of the agents or officers of the State of Virginia, acting under the compulsion and authority of the act of May 12th, when they are confronted with a restraining order of a Federal Court? That is the further question which we have to consider in the proposition before us. Except where the Constitution of the United States applies, a *casus fœderis*, the States of the Union in respect to each other, and to the government of the United States, are to be considered in the light of independent sovereignties, bound by the obligations and protected by the law of nations. It is not necessary to cite authority to sustain this conceded principle of Federal law. There is nothing in the Federal charter of granted powers, which confers on any department of the government, which it designed to create, any authority to punish a State officer for obeying the State laws. If there were any such jurisdiction, it would put a State in chains and, at a single blow, destroy all States' Rights. If we would guard and protect the States of the Union, as entities, and save them from becoming practically non-entities, we must extend to them the principle of the public law, enunciated in McLeod's case by Secretary Webster. Every reason of necessity and policy which entitles an external power, like Great Britain, to the application of the rule of law, equally applies, in the case before us, to the State of Virginia. Government, except where obtained from a superior power as a colonial charter, is a growth of society. It is impossible for a community of human beings to exist without a government. This is true of political society, and in natural society there is the authority of the magister. When the North American States associated under a federative compact, for self-protection, each State possessed a government claiming and exercising the right of control over its subjects, and, as incidental to that great authority, and inseparable from it, the further right to protect them from personal responsibility to any other power for acts of obedience to the home government. The natural right of every political body

to provide itself with a government grows out of a necessary inherent sovereignty, and when Mr. Justice Matthews (page 505) instructs the country in the constitutional doctrine that the States of the Union are "invested with that large residuum of sovereignty which has not been *delegated* to the United States," he in effect admits the natural authority of a State of the Union to create a government, an apparatus which cannot act, or even exist, without agents, who are shielded from all external personal responsibility. The right of protection is indeed the condition of the duty of obedience.

When the man of affairs, instead of the idealogue, comes to deal with this problem, the misty atmosphere with which metaphysics invested it in a court-room disperses. Happily for the cause of truth in this case, we are not without the authority of a very respectable precedent to sanction this position, which ought to command the assent of lawyer and layman.

When the States of the South Section withdrew from fellowship and union with the United States to found a government in accord with their own ideas, the secession was effected by each State exercising an absolute jurisdiction over its citizens. It was the absolute power over its people which inheres in sovereignty, whether republican or monarchic, and nowhere in history was that absolute principle more fully comprehended, asserted or conceded than in the Southern Commonwealths of that period. Virginia, in that supreme hour, claimed to extend her sceptre over every man who had been born on her soil. He belonged to her, she asserted, by a perpetual and inalienable allegiance. She spoke like a king, "Once a subject, always a subject." She sounded her clarion, and her sons came to her from all climates and all localities. It was a proud moment in the history of that mother of statesmen! Here is an historic declaration of that principle, a defiance to the proclamation of President Jackson, from the pen of John Randolph of Roanoke, adopted with one voice by the people of Charlotte county: "The allegiance of the people of Virginia is due to her; to her their obedience is due, while to them she owes protection against all consequences of such obedience." (Home Reminiscences of Randolph, by Powhatan Bouldin.) Here also is another declaration of that organic principle of States' Rights by Josiah Quincy, another great man, but born in the opposite section of the United States: "As it is with the people of every State, so it is with the people of this Commonwealth—the individuals composing this State owe to the people of Massachusetts an allegiance original, inherent, native and per-

petual." In the just meaning of the word "State," it ceases to exist when despoiled of the right to protect its agents and officers from personal responsibility incurred by obedience to the State. This right to protect is indeed the basanite and touch-stone of the retention of the sovereign principle. This truth Mr. Justice Matthews, and his learned brothers of the silken stole, knew as well as others. They understood well enough that, in the language objected to, they were cutting the tap-root of the States' system. This is one of the deplorable consequences of intrusting political power to courts and judges, as they are ever seeking to widen and extend their jurisdictions, which acts of aggression, piously, they call *law*.

The right of protection denied when men's minds are engrossed in the pursuit of gain, or are sunk in repose, was not called in question by the United States amid the throes of the secession period. Among the great number of Confederate prisoners, captured with arms in their hands and blood stains on their uniforms, not one was held in a treason trial for levying war on the United States, or for conspiring against their government. Even he, the Heresiarch, thus panoplied, was allowed to walk forth from his casement, untried, unquestioned and unhurt.

Why? Surely not because a justification was conceded to the right of secession, but because, under our system of a Union of Sovereign States, each man, the ringleader and all, were covered from personal responsibility by the admitted duty of obedience, each man to his State. But the States, which had assumed the responsibility for the acts of their statesmen and soldiers, were punished by all the stern methods of war. Here the world has an exposition of the law of our Union, applicable to this case, made by the able men who had been put in charge of the Government of the United States by a great nation girded with the sword, the public judgment and the courts as well consenting. It is a precedent which even the Supreme Court of this sleepy period might not entirely ignore if it were possible for a lawyer to look abroad into universality and put by his catechism of the court room. It was an historic era which tells us in language, not to be forgotten or misunderstood, what in American law is meant by a sovereign State. It is not an idle form of words, as the Supreme Court appear to consider. This is the memorable lesson which the political power teaches to the judicial power. But Mr. Justice Matthews rejects this interpretation of the Constitution and laws, and the appeal now is taken to the Areopagy of opinion. The autocratic Justice Matthews thus pronounces the sentence

of his absolute and final court: "The Government of the United States in the enforcement of its laws, deals with all persons in its territorial jurisdiction as individuals owing obedience to its authority. The penalties of disobedience may be visited on them without regard to the character in which they assume to act, or the nature of the exemption they may plead in justification. Nothing can be interposed between the individual and the obligation he owes to the Constitution and laws of the United States, which can shield or defend him from their just authority, and the extent and limits of that authority, the United States by the judicial power interprets and applies for itself. If, therefore, an individual acting under the assumed authority of a State, as one of its officers, and under color of its laws, comes into conflict with the superior authority of a valid law of the United States, he is stripped of his representative character, and subjected, in his own person, to the consequences of his individual conduct. The State has no power to impart to him any immunity from personal responsibility to the supreme authority of the United States."

Are we in St. Petersburg, or was this dictatorial language used to the sovereign States by their own creature? In this extract from its opinion, the Supreme Court chooses to ignore the fact that the nation of the United States is a *federal* nation, not a solid body of individuals, that each State under the Constitution is a sovereignty, which the Supreme Court, in its interpretation of the Constitution, is not at liberty to impair or destroy. An important point of the argument is that without an irresponsibility in the persons and fortunes of its agents to the Federal Government, or to any of its departments, the State powers may be *destroyed*, since a State must act through the agency of individuals and cannot act in any other way.

Cannot a Federal judge be made to understand that any theory of Federal authority that would operate to accomplish that disastrous result would be, must be, unconstitutional? Surely the Supreme Court does not deny it to be as unconstitutional to strike the system in its entirety as to wound a particular part of it! The Rt. Hon. James Bryce, in his survey of our Government, felt warranted in saying: "The States have learned to fear the Supreme Court as an antagonist." Indeed, it is a *Constrictor* which they feel may crush their system. The apprehension is well founded, and their sovereignty is the only practical limitation to its growing jurisdiction. If additional securities are not provided by the Constitution, or the Courts, it will happen that the States must consult the last volume of the Supreme Court Reports to be

taught how much, or how *little*, of the old covenanted liberty has been left. The Supreme Court has become a maelstrom in which all ships that navigate the Federal sea may be drowned—a sun into whose glowing furnace, by an irresistible attraction, star, comet, system—all—will be precipitated. But the authority for the imperious language employed by Mr. Justice Matthews, quoted above, is *Osborn v. Bank of the United States*, the Ohio case, as recognized by judges and lawyers, which is found in 9th of Wheaton's United States Reports, page 738; and I cannot, in justice to the cause which I presume still to champion, forbear its mention here. It has been a landmark in the profession, an idol to which men have bowed, but, happily, it can no longer, I think, be regarded in that light. By a statute of Ohio a tax of $500 was imposed on each bank of the United States doing business within the State, and by the authority of a warrant, or execution, from Osborn, the Auditor, as the statute provides, Harper entered the bank at Chillicothe and carried off coin and notes sufficient to satisfy Ohio's demand, and delivered the money to Curry, the Treasurer, who placed it to the credit of the State on the treasury books, yet kept it in a trunk separate from other monies.

This particular fund, with the rest of the treasury's contents, was delivered to Sullivan, Curry's successor, who receipted for it as Treasurer, "not otherwise," but it was retained in the trunk where Curry had placed it.

On the 4th day of September, 1819, a bill for an injunction was exhibited in the Circuit Court of the United States for Ohio against Osborn and Harper, and the injunction was served on Harper whilst he was on his way to Columbus, and on Osborn before Harper reached Columbus.

In September, 1820, a supplemental and amended bill was filed making Osborn, Harper, Curry and Sullivan parties. On that bill the cause proceeded to a decree against the defendants, and was appealed to the Supreme Court, and heard at the February term, 1824. The Judges treat as undeniable law, and founded their reasoning upon it, that a principal in a trespass is jointly liable with the agent who commits it, and that it is error if he be not joined as a party to the suit.

The court say: "The fact is made out in the bill that Osborn employed Harper to do an illegal act, and that he is jointly liable with the agent who commits it, is as well settled as any principle of law whatever." (Page 837). This responsibility attaching to an individual trespasser who acts through an agent, the court applies to a State of

the Union. "The direct interest of the State in the suit," the court say, "is admitted, and, had it been in the power of the bank to have made the State a party, perhaps no decree could have been pronounced in the cause, until the State was before the court." (Page 846-7). According to this exposition, in absence of the eleventh amendment of the Constitution of the United States, the respondents to the amended and supplemental bill would have been Osborn, Harper, Curry, Sullivan, and the State of Ohio, represented by its Governor and Attorney General, according to the precedent of *Chisholm v. Georgia*, 2 Dallas 419. In this condition of parties, by the public law, as stated by Secretary Webster, the bill as soon as the relation of the parties was discovered by the Court, would have been dismissed as to the respondents, but retained against Ohio; for already the Court had said they had jurisdiction to administer any law connected with the case (page 820-23), and, of course, the public law, a part of all civilized codes.

Sustained by these authorities, we stand now on the hard ground of this proposition: Before the adoption of the eleventh amendment to the Constitution, an agent of the State could not have been held to a personal responsibility by a Federal court, because the State, the responsible party, might be produced before the court as a respondent.

If, after the adoption of that amendment, the agent is held responsible, it must be because the amendment creates the responsibility. Here, in its puissance, is the eleventh amendment, and let it speak for itself: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." This amendment confers no power, it transfers no responsibility, it is wholly prohibitory. It interdicts, in particular cases, suits against one of the United States, and that is the whole scope of the amendment. By what authority, then, a reader may inquire, is the agent of a State suable, after the offending actor has been guaranteed and protected by an interdict of the Constitution? If such responsibility, which did not exist before the adoption of the eleventh amendment, exists afterwards, it must be because of the words of the amendment, or some proper deduction from them, which we see is not the case. If such responsibility be transferred to the agent, from the exonerated principal, the amendment is made craftily to undo its work. What did Ohio gain, it may be asked, or the bank lose, by the eleventh amendment? The court compelled the State officer (Sullivan) to enter the treasure-house of Ohio—it was an act of violence—and

take the money out of the trunk where Curry had placed it, and hand it back to the bank, the very thing that must have been done if the eleventh amendment had not been appended to the Constitution.

What a nose of wax has not the Constitution become in the dextrous hands of the Supreme Court! The *object* of the eleventh amendment was to vindicate the sovereign principle, attached to each State, which had been impaired by the Constitution as at first made, as we learn from *Chisholm v. Georgia.*

The principle of State sovereignty was made the sub-base of the Constitution, and it lies there still, as does, in Indian seas, amid all convulsions, the coral foundation of their islands and continents.

The judge who rendered the opinion of the court felt the burden he was assuming. He said: "It was not in the power of the bank to have made the State a party, *and the very difficult question is to be decided whether in such a case the court may act on the agents of the State and the property in their hands.*" But the difficulty, by a masterful effort, was overcome, the pioneers smoothed and leveled the way for succeeding judges and courts, and now, instead of the hesitating, apologetic language of the pioneer judge, the States are bearded by the autocratic *dictum* of Mr. Justice Matthews. So power grows! The amendment, when properly construed, covers with its ægis as well principal as agent; for in every human transaction, by every code, the agent is but the *alter ego* of the principal. In law they are the same man. It is not necessary to say more on this point. To punish or compel the agent of a released principal, it is clear enough now, was a palpable violation of the Constitution.

It was decided also in *Osborn v. The Bank,* that a State could not be regarded as a party to the suit unless it was so named in the record, the interest of Ohio in the case being conceded in the court's opinion. With a purged vision the Supreme Court *now* say in the *habeas corpus* cases: "To secure the manifest purposes of the Constitutional exemption guaranteed by the eleventh amendment, requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover not only suits brought against the State by name, but those also against its agents, officers, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the judgment or decree effectively operates." But in the Ohio case a very serious obstacle was interposed. Such a conclusion would have ousted the Supreme Court

of jurisdiction in the cause, as in the *habeas corpus* cases; a conclusion to which, in the inflamed condition of parties, that Court, by any process of reasoning, did not intend to be conducted. Party interests were paramount with the judges of the Supreme Court at that period of the nation's history, as they have been supposed to be since. If the Ohio case is to stand as law, and also the autocratic judgment of Mr. Justice Matthews, the result we have reached is that the Constitution has turned the Judges out of a jurisdiction by the front door, but, with false keys, they have entered again by the back door.

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CRIMINAL TRIALS.*

Says Gibbon, in his celebrated Forty-fourth Chapter: "This union of the judicial and legislative powers left it doubtful whether the accused was pardoned or acquitted, and in the defense of an illustrious client the orators of Rome and Athens addressed their arguments to the policy and benevolence as well as to the justice of the sovereign."

This observation suggests, I think, the leading characteristic of probably all the old penal systems. Though there were manifold abuses, such as the subservience and corruption of trial bodies and the brutality of punishments, the overshadowing vice was a failure to separate the judge from the legislator, and a confusion and comingling of their duties, in utter disregard of a principle that ought to have been treated as fundamental. While that vice existed, the dawn of reform in criminal jurisprudence that has been followed by such a splendid day, could not come. In fact, while it existed the entire criminal law was a poor and meagre fabric. The historian of the Decline and Fall says again: "The penal statutes form a very small proportion of the sixty-two books of the Code and Pandects, and in all judicial proceedings the life or death of a citizen was determined with less caution or delay than the most ordinary question of covenant or inheritance." There were careful and minute enactments to locate and protect the ownership of property, but by no means so careful or so minute were the enactments declaring offenses and providing penalties. The caprice,

*A paper read before the Virginia State Bar Association at its recent meeting at the White Sulphur Springs, W. Va., by R. Walton Moore, Esq., of Fairfax C. H.